

CASE NO. PD-0748-17

**IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

FILED
COURT OF CRIMINAL APPEALS
9/25/2017
DEANA WILLIAMSON, CLERK

**KELSEY JO LACKEY,
Appellant**

VS.

THE STATE OF TEXAS

**On Appellant's Petition for Discretionary Review
from the Tenth Court of Appeals in case no. 10-17-00016-CR.
Affirming the conviction in cause no. 13-04695-CRF-272
in the 272nd District Court of Brazos County, Texas.**

**STATE'S REPLY TO APPELLANT'S
PETITION FOR DISCRETIONARY REVIEW**

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Appellant’s petition should be refused where:

The record shows that Appellant pled guilty in a negotiated plea and knowingly, intelligently and voluntarily waived his right to appeal. The court of appeals properly dismissed the appeal for want of jurisdiction based on the trial court’s amended *Trial Court’s Certification of Defendant’s Right of Appeal*, which certified that Appellant waived his right to appeal.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas, by and through its District Attorney, and
files this brief in compliance with Rule 68, Texas Rules of Appellate Procedure, in
response to Appellant's grounds for review.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument only if granted to Appellant.

STATEMENT OF THE CASE

Appellant was indicted for two counts of Theft more than \$200,000 on December 18, 2014. (CR 6). In count one, Appellant pled guilty to the lesser offense of Theft more than \$100,000 but less than \$200,000 and agreed to a sentence of three years IDTDCJ. (CR 127: count one). In count two, Appellant pled guilty to the lesser offense of Theft more than \$100,000 but less than \$200,000 and agreed to a probated sentence of ten years and payment of \$350,000 restitution as a condition of probation, with \$50,000 due at sentencing. (CR 128: count two). The trial court accepted the plea agreements in both counts and sentenced Appellant pursuant to the terms of their respective plea bargain agreements. (CR 137, 150). Appellant filed notice of appeal on January 6, 2017. (CR 125).

STATEMENT OF PROCEDURAL HISTORY

On March 20, 2017, a majority of the Tenth Court of Appeals dismissed the appeal for want of jurisdiction, based on the trial court's amended *Trial Court's Certification of Defendant's Right of Appeal*, which certified that Appellant had waived his right to appeal. TEX. R. APP. P. 25.2(d). Appellant's *Corrected* Petition for Discretionary Review was filed August 23, 2017. The State's motion for extension of time to file the State's reply to Appellant's petition was granted until September 22, 2017.

APPELLANT’S GROUND FOR REVIEW (Restated)

1. Did Appellant voluntarily, knowingly and intelligently waive his right of appeal by signing a boilerplate waiver?

STATE’S REPLY

Appellant’s petition should be refused where:

The record shows that Appellant pled guilty in a negotiated plea and knowingly, intelligently and voluntarily waived his right to appeal. The court of appeals properly dismissed the appeal for want of jurisdiction based on the trial court’s amended *Trial Court’s Certification of Defendant’s Right of Appeal*, which certified that Appellant had waived his right to appeal.

Objection to citations outside the record

The State initially objects to Appellant’s petition, where it is supported by citations to a clerk’s record that does not comport with the one filed with this Court.

Appellant’s petition initially contains the following incorrect assertions/citations: “Appellant filed two pretrial motions to quash the indictment. (CR32-40, 128-31). The trial court denied both. (CR13, 14).” (Appellant’s Petition, p. 1). However, a review of (CR 32-40) shows that it contains a signature page for a State’s motion and defendant’s and co-defendant’s motions for continuance. A review of (CR 128-131) shows that it is a cite to the *Plea Agreement and Order and Defendant’s Plea of Guilty, Waiver, Stipulation and Judicial Confession*. A review of (CR 13, 14) shows that it is a citation to the *State’s Notice Of Intent To*

Use As Evidence Business Records Accompanied By Affidavit and its attached affidavit. (CR 13, 14).

The clerk's record contains 155 pages, total. Yet, Appellant's petition (pp. 1-8) also cites to pages in the clerk's record beyond page 155.¹ For example, Appellant states "[d]uring the plea colloquy, the trial court first confirmed that Appellant's name was spelled correctly. Then Appellant waived the right to have the indictment read. (**CR257**)¹[.]" (Appellant's petition, p. 4) (emphasis added). Footnote 1 of the petition then goes on to state: "Although the reporter's record was never filed in the Court of Appeals, the reporter's record from the plea hearing is **included in the clerk's record as Exhibit 17 to a mandamus petition** filed with the court of appeals, a copy of which was also filed with the trial court. (**CR403-18**).'" (Appellant's petition, p. 4) (emphasis added).

Apparently, Appellant's citations in the petition are to a clerk's record for the mandamus petition filed with court of appeals. However, the case involving the mandamus petition (no. 10-17-00076-CR) is not before this Court. Consequently, the State objects to Appellant's citations, which claim to be for the clerk's record for this case, and are either not correct or are outside the record. TEX. R. APP. P. 38.1(i); *also see Booth v. State*, 499 S.W.2d 129, 135 (Tex. Crim. App. 1973)

¹ A review of the petition (pp. 1-8) shows that all citations, except those found in the first paragraph of page 1 of the petition, are beyond page 155.

(explaining that appellate court is not authorized to consider documents attached to an appellate brief which are not part of the record).

Relevant facts

In the *Defendant's Plea of Guilty, Waiver, Stipulation and Judicial Confession*, Appellant expressly waived his right to appeal. (CR 129-132: count two; CR 133-136: count one). Specifically, in the *Defendant's Plea of Guilty, Waiver, Stipulation and Judicial Confession*, Appellant averred that:

...it is my desire to waive my right to *pursue a motion for new trial* and to appeal, and I hereby voluntarily, knowingly and intelligently waive those rights in the event that the Judge accepts the plea bargain agreement. I understand that if the Judge accepts the plea bargain agreement, I may appeal only with permission of the court.
(CR 131: count two; CR 135: count one).

On January 30, 2017, the trial court amended its *Trial Court's Certification of Defendant's Right of Appeal*², certifying that:

this criminal case is a plea bargain case and matters were raised by written motion filed and ruled on before trial but those matters were waived at the plea hearing & permission to appeal, though not appropriate, was denied. See State's Ex No 1^[3] at plea hearing. TBB III 1-30-17.
(CR 149).

2 Per the plain language of Tex. R. App. P. 25.2 (f), the trial court was permitted to amend certification of right to appeal at any time before filing of appellate brief. *See Torres v. State*, 493 S.W.3d 213, 217 (Tex. App.—San Antonio 2016, no pet.).

3 State's Exhibit 1 at the plea hearing is the *Defendant's Plea of Guilty, Waiver, Stipulation and Judicial Confession*. (See CR 129, 133: bottom right corner "State's Exhibit 1.").

Discussion

Initially, the State responds that Appellant waived his right to complain where he did not file a motion to strike the amended certification as expressly allowed by Tex. R. App. P. 25.2(f) (“The amended ... certification is subject to being struck for cause on the motion of any party affected by the amended ... certification.”). Consequently, the court of appeals properly relied on the amended certification when determining that the appeal must be dismissed. TEX. R. APP. P. 25.2(d).

Moreover, “the trial court is in a better position to determine whether the previously executed waiver of appeal was in fact validly executed and if there is any arguable merit in appellant’s desire to appeal.” *Willis v. State*, 121 S.W.3d 400, 403 (Tex. Crim. App. 2003). A valid waiver of the right to appeal will prevent a defendant from appealing without the consent of the trial court. TEX. CODE CRIM. PROC. art. 1.14(a); *Monreal v. State*, 99 S.W.3d 615, 617 (Tex. Crim. App. 2003). When a defendant waives his right of appeal as part of an agreement on sentencing and the agreement is followed by the court, his waiver is made knowingly, intelligently, and voluntarily. *See Ex parte Delaney*, 207 S.W.3d 794, 798–99 (Tex. Crim. App. 2006); *also see Marsh v. State*, 444 S.W.3d 654, 660 (Tex. Crim. App. 2014) (“Rule 25.2(a)(2)(A) does, in fact, grant defendants who plead guilty as part of a plea bargain the right to appeal pretrial motions. What Appellant fails

to recognize, however, is that a defendant may waive this right, as long as the waiver is made ‘voluntarily, knowingly, and intelligently.’”)

Here, the record for Case No. PD-0748-17/Case No. 10-17-00016-CR shows that Appellant knowingly, intelligently, and voluntarily waived appeal as part of a negotiated plea bargain agreement, and the trial court certified that Appellant had validly waived his right to appeal. (CR 149). Consequently, the court of appeals properly dismissed the appeal for want of jurisdiction, based on the trial court’s amended certificate of right to appeal, which certified that Appellant had waived his right of appeal. TEX. R. APP. P. 25.2(d).

PRAYER

Wherefore, the State prays that the Court refuse Appellant’s petition for discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the State's Reply was emailed to E. Alan Bennett, Attorney for Appellant, at abennett@slm.law.

/s/ Douglas Howell, III

Douglas Howell, III

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

I certify that the foregoing document has a word count of 1112 based on the word count program of Word 2010.

/s/ Douglas Howell, III